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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

v.

RAYMOND G. DECHAMPLAIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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The two points asserted in appellee's motion to dismiss warrant a brief reply.

1. Appellee contends that this appeal fails to present a substantial federal question because the constitutionality of Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, is presently pending before this Court in *Secretary of the Navy* v. *Avrech*, No. 72-1713, argued February 20, 1974, and *Parker* v. *Levy*, No. 73-206, argued February 20, 1974.

Even assuming that the Article 134 issue will be decided in *Avrech* and *Levy*, jurisdiction should be noted in this case. This Court's decisions in *Avrech* and *Levy* would be dispositive only if this Court were to hold Article 134 in its entirety unconstitutional on its face. Any other disposition of *Avrech* and *Levy* would not be controlling in the instant case, since appellee makes no claim that the conduct with which he was charged

is constitutionally protected, and since appellee was charged under the third clause of Article 134 ("crimes and offenses not capital"), which is not involved in *Avrech* and *Levy*.

Appellee does not, and could not, contend that the third clause of Article 134 is impermissibly vague. Instead, DeChamplain asserts that he is "in serious jeopardy of conviction pursuant to the first two clauses of that Article" ("all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces") (Motion to Dismiss, p. 5). Even if this argument were meritorious, it would not support the injunction entered by the district court, which bars a court-martial under all three clauses of Article 134. This fact alone demonstrates that the decision below was incorrect.

DeChamplain is charged only under the third clause and, contrary to his assertions, he is not in jeopardy of being tried under the first two clauses of Article 134. The Manual for Courts-Martial, paragraph 213(a), published as E.O. 11476, 34 Fed. Reg. 10502, 10879, does provide:

> Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction.

See, *e.g.*, *United States* v. *Long*, 2 U.S.C.M.A. 60, 6 C.M.R. 60; compare, *United States* v. *Smith*, 21 U.S.C.M.A. 264, 45 C.M.R. 38; *United States* v. *Rowe*, 13 U.S.C.M.A. 302, 32 C.M.R. 302. In reviewing DeChamplain's first conviction, however, the Air Force Court of Military Review held that he had been prosecuted only under the third clause. *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.[1] As the present charges are based upon the previous charges, DeChamplain's argument that he is "in serious jeopardy" of conviction under the first two clauses of Article 134 is incorrect.

In any event, DeChamplain's argument demonstrates that civilian courts should defer their review until after the court-martial and the military appeals have been completed. If the vagueness issue were presented at that time, there would be no need for the court to speculate whether an accused faced possible conviction under the first two clauses as well as the third clause of Article 134.

Indeed, this case convincingly demonstrates the wisdom of deferring civilian court review until the court-martial and military appeals have been concluded. Had the second court-martial been allowed to proceed, issues now pending in civilian courts would never have arisen, such as whether DeChamplain faced the possibility of conviction under the first two clauses of Article 134, the propriety of pre-trial confinement,[2] and whether a three-judge court was required.

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[1]This holding adopted DeChamplain's position. In contrast to his position in this Court, DeChamplain argued in his first court-martial that he was charged solely under the third clause. See *United States* v. *DeChamplain*, *supra*, 46 C.M.R. at 788.

[2]DeChamplain recently filed a petition in the Court of Military Appeals challenging the legality of his present confinement. On April 17, 1974, that petition was dismissed. *DeChamplain* v. *Lovelace*, Misc. No. 74-28. DeChamplain also unsuccessfully sought

2. DeChamplain's second contention is that this Court lacks jurisdiction of the appeal because this case required a three-judge district court (Motion to Dismiss, pp. 5-8).[3] The premise of this argument is that the preliminary injunction which DeChamplain moved the single-judge district court to enter, without requesting a court of three judges, is improper. See Plaintiff's Motion for Preliminary Injunction, filed October 3, 1973.

DeChamplain states that "it has long been the rule that this Court may not review injunctions entered by a single district judge that required the consideration of a three-judge court * * *" (Motion to Dismiss, p. 5). The authorities cited for that proposition,[4] however, merely

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his release in the court of appeals (No. 74-1363) and the district court (Civ. No. 1863-73) in the District of Columbia. Currently he is challenging his pre-trial confinement in a petition for *habeas corpus* in the District Court for the Western District of Missouri. *DeChamplain* v. *Lovelace* (Civ. No. 74CV169-3-W).

[3]DeChamplain apparently suggests that this action should be further fragmented if remanded by having some issues considered by a three-judge district court, whose decision would be appealable to this Court, and other issues decided by a single-judge court, whose decision would be reviewable in turn by the court of appeals and then this Court (Motion to Dismiss, pp. 7-8).

[4]*Hicks* v. *Pleasure House, Inc.*, 404 U.S. 1; *Schackman* v. *Arnebergh*, 258 F. Supp. 983 (C.D. Cal.), appeal dismissed, 387 U.S. 427; *Buchanan* v. *Rhodes*, 249 F. Supp. 860 (N.D. Ohio), appeal dismissed, 385 U.S. 3; *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U.S. 10.

hold that 28 U.S.C. 1253 does not authorize a direct appeal in such circumstances; none of these precedents bars a direct appeal under 28 U.S.C. 1252. This appeal is expressly authorized by Section 1252, because it involves review of "an interlocutory or final * * * order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which" an officer of the United States is a party. If, however, as DeChamplain argues, the court below lacked jurisdiction, this Court should vacate the preliminary injunction. See *Federal Housing Administration* v. *The Darlington, Inc.*, 352 U.S. 977; *Flemming* v. *Nestor*, 363 U.S. 603, 607.[5]

We submit that a three-judge district court was not required in this case. DeChamplain sought (Plaintiff's Motion for Preliminary Injunction, *supra*) and obtained (J.S., p. 29), an injunction only against his own court-martial under Article 134. He did not seek "to paralyze totally the operation of an entire regulatory scheme * * *." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154. Here, as in *Flemming* v. *Nestor*, *supra*, the constitutionality of a federal statute has been drawn into question, but the suit does not "seek affirmatively to interdict the operation of a statutory scheme." 363 U.S. at 607.

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[5]As a precautionary measure, we also filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit from the preliminary injunction. On April 5, 1974, the court of appeals denied DeChamplain's motion to dismiss that appeal and, acting on our motion, extended the time for docketing the record until fifteen days after the final decision of this Court of the direct appeal. *DeChamplain* v. *McLucas*, No. 74-1363 (C.A.D.C.).

For these reasons, the single-judge court below could properly consider the merits of this dispute, and the entire case is now properly before this Court.[6]

Moreover, whether or not the single-judge court below properly reached the issue of the constitutionality of Article 134, that court could decide the threshold issue of "whether the complaint at least formally alleges a basis for equitable relief * * *." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715. DeChamplain's complaint fails to meet this test because, as shown in our Jurisdictional Statement, pp. 6-9, no civilian court can properly enjoin a pending court-martial under the circumstances alleged. Accordingly, even if the constitutional issue presented required a three-judge court, the threshold issue could be decided by the single-judge court below, and this Court has the power on this appeal to reverse the erroneous resolution of that issue.

For these reasons, together with those set forth in our Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted.

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[6]But compare Kennedy v. *Mendoza-Martinez, supra* and *Fleming* v. *Nestor, supra,* with *Steffel* v. *Thompson,* No. 72-5581, decided March 19, 1974, n. 7 (dictum), and *Schneider* v. *Smith,* 390 U.S. 17; see *Torres* v. *Connor,* 329 F. Supp. 1025 (N.D. Ga.).

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